CATCHWORDS

Migration Law - refusal of protection visa - judicial review of decision of the Refugee Review Tribunal - whether Indonesian national born in East Timor in 1973 who has a well-founded fear of being persecuted for reasons of political opinion is a refugee - dual nationality - whether applicant also a Portuguese national - whether applicant acquired Portuguese nationality at birth - whether, taking account of events in or since 1975, the applicant retained Portuguese nationality - whether an Australian court should recognise Portuguese nationality - whether Portuguese nationality effective and available

Statutes - interpretation - domestic law incorporating provision of international treaty - approach to construction - Convention Relating to the Status of Refugees Art 1A(2)

Migration Act 1958 s 476

Migration Regulations subclass 866 in schedule 2

1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees Art 1

1969 Vienna Convention on the Law of Treaties Art 31

1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws Arts 1-3, 5

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331

Canada (Attorney General) v Ward (1993) 103 DLR 4th 1

Case concerning East Timor (Portugal v Australia) ICJ Rep (1995) 90

Nagalingam v Minister for Immigration (1992) 38 FCR 191

Minister for Foreign Affairs and Trade v Magno (1992) 112 ALR 529

Sykes v Cleary (1992) 176 CLR 77

Oppenheimer v Cattermole [1976] AC 249

United States Ex Rel Schwarzkopf v Uhl (1943) 137 F 2d 898

Doe d Thomas v Acklam (1824) 2 B&C 779

R v Ramage (1902) 23 Natal Law Reports (NS) 45

JONG KIM KOE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

No. NG 180 of 1996

CORAM: Black CJ, Foster and Lehane JJ

PLACE: Sydney

DATE: 2 May 1997

IN THE FEDERAL COURT OF AUSTRALIA)

NEW SOUTH WALES DISTRICT REGISTRY)

GENERAL DIVISION) No. NG 180 of 1996

BETWEEN: JONG KIM KOE

Applicant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Respondent

CORAM: Black CJ, Foster and Lehane JJ

PLACE: Sydney

DATE: 2 May 1997

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal is set aside.

2. The matter is remitted to the Refugee Review Tribunal for further consideration in accordance with law.

3. The respondent is to pay the applicant's costs.

NOTE**:** Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)

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PLACE: Sydney

DATE: 2 May 1997

REASONS FOR JUDGMENT

THE COURT: This is an application under s 476 of the Migration Act 1958 for review of a decision of the Refugee Review Tribunal (the Tribunal). Although in the original jurisdiction of the Court, the application was heard by a Full Court, a direction having been given by the Chief Justice under subs 20(1A) of the Federal Court of Australia Act 1976. By its decision, made on 7 February 1996, the Tribunal affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs (the Minister) that the applicant, Mr Jong, is not a refugee and determined that Mr Jong was not entitled to a protection visa. A "protection visa" is one falling within subclass 866 in Schedule

2 to the Migration Regulations and the principal criterion, which an applicant must satisfy in order to qualify for such a visa, is that:

> *The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.* The Refugees Convention (as we shall continue to refer to it) is the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees: Australia is a party to each of those international instruments.

The application, filed on 6 March 1996 (and thus within the time limit provided by para 478(1)(b) of the Migration Act), has been amended and further amended. After claiming that Mr Jong is a person aggrieved by the Tribunal's decision (he is a person who, under s 489, may apply for review of the decision), the further amended application sets out, as grounds on which the Court should review the decision of the Tribunal, eight errors of law which the Tribunal is said to have made. A ninth ground was not pressed. Because the argument concentrated on a number of particular aspects of the law relating to refugees and their application to the facts of this case, we think it preferable to consider first the broad issues argued before us and then to return to the specific grounds on which review is sought.

Facts and decisions

It was of course the function of the Tribunal to find the facts. It found that Mr Jong was born in East Timor on 30 April 1973 and that on 24 July 1975 the Portuguese authorities in East Timor issued what is described as a Cedula Pessoal. A copy of it is in evidence. It is in Portuguese and no translation was provided to us; apparently, however, it states Mr Jong's date and place of birth and other personal details. The Tribunal found that in 1991 Mr Jong participated in demonstrations preceding a

massacre at Santa Cruz cemetery, as (it found) did other members of his family. Some four months later his

Indonesian passport was extended by authorities in East Timor and he came to Australia in 1992. Since then he has participated in demonstrations and rallies in support of independence for East Timor. Members of his family gave evidence to the Tribunal that the Indonesian authorities in East Timor have shown considerable interest in his whereabouts.

On 30 April 1992 Mr Jong applied to the Minister for recognition as a refugee. On 6 August 1993 the Minister's delegate rejected that application, on the basis that Mr Jong did not satisfy the requirement, in the definition of "refugee" in Article 1A(2) of the Refugees Convention, that he have a:

> *... well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion ...*

Mr Jong applied to the Tribunal for a review of that decision. The review proceedings were by no means quick and it was not until 7 February 1996 that the Tribunal gave its decision. In brief, largely because of further material provided by Mr Jong which had not been before the delegate, the Tribunal concluded that if Mr Jong returned to Indonesia he would face a real chance of persecution for one of the reasons stated in Article 1A(2) but that the delegate's decision should be affirmed, and Mr Jong denied a protection visa, on another ground. This was that Mr Jong was both an Indonesian national (a conclusion which was not challenged before us, seems clearly right and about which nothing further need be said) and also a Portuguese national with the result that, there being no

suggestion that there was a likelihood of persecution in Portugal, his fear of persecution in Indonesia (including East Timor) did not make him a refugee.

Legal context

As a party to the Refugees Convention, Australia has obligations to persons falling within the convention's definition of "refugee": obligations, for example, to apply the provisions of the Refugees Convention to refugees without discrimination as to race, religion or country of origin (Article 3); to accord freedom of religion (Article 4); to allow freedom of association (Article 15); to permit free access to Australian courts (Article 16); and, particularly, not to:

> *... expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.* (Article 33)

Neither the Migration Act nor the Migration Regulations transpose the terms of the Convention definition of "refugee" as part of domestic law. Instead, as authorised by s 36(2) of the Act, the Migration Regulations describe the class of persons who satisfy the criteria for the issue of a protection visa by reference to Australia's "protection obligations" under the Refugees Convention, that is to say, by reference to obligations which Australia has a matter of international law.

It is evident, therefore, that the term "refugee" must for present purposes be construed having regard to applicable provisions or principles of international law: particularly, of course, the Vienna Convention on the Law of Treaties 1969 (the Vienna Convention)

and the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 (the Hague Convention), to both of which Australia is also a party.

For present purposes, the central provision of the Vienna Convention is Article 31 (set out later in these reasons), which requires an ordered yet holistic approach to the interpretation of a treaty and whilst giving primacy to the written text, requires a consideration of the context, object and purpose of the treaty: see Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331 per McHugh J at 349-352 and per Brennan CJ, agreeing, at 332, and Gummow J, at 369-370. (At the time relevant for the High Court's consideration in Applicant A, s 4(1) of the Migration Act was in a form that expressly provided that the term "refugee" had the same meaning as in Article 1 of the Refugees Convention, but the Court's observations about the interpretation of treaties are of general application.)

In the present context it is desirable to bear in mind also the observation of McHugh J in Applicant A (at 352) that:

> *... international treaties often fail to exhibit the precision of domestic legislation. This is the sometimes necessary price paid for multinational political comity. The lack of precision in treaties confirms the need to adopt interpretative principles ... which are founded on the view that treaties "cannot be expected to be applied with taut logical precision".* (Footnotes omitted)

The definition of "refugee" (so far as it is relevant to this case) appears in Article 1 of the Refugees Convention as follows:

> *A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: ...*
>
> > *(2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*
> >
> > *In the case of a person who has more than one nationality, the term the 'country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.*

Submissions

The submissions made to the Court by counsel for Mr Jong, Ms C A Ronalds and Dr P E Nygh, can be summarised in the following propositions. First, the Tribunal was in error in concluding that, as a matter of Portuguese law, Mr Jong is a Portuguese national; secondly, if by that law Mr Jong is a Portuguese national, then the Tribunal erred in concluding that in the present circumstances an Australian tribunal or court should recognise, or give effect to, that nationality; and thirdly, if the Tribunal was not thus in error, it nevertheless made an error of law in failing to conclude that Mr Jong's

Portuguese nationality was, for the purposes of the Refugees Convention, not "effective". Additionally, two arguments were put to us by Mr R Dubler, counsel for the Australian Section of the International Commission of Jurists who appeared, by leave, as *amicus curiae*. Both his arguments supported the second proposition in our summary of the argument of counsel for Mr Jong. Mr Dubler's first submission was that it was wrong, as a matter of international law, to treat a former colonial power's nationality as persisting in residents of its former colony where international law recognised, in those persons, a right of self-determination. Secondly, he submitted that the Refugees Convention was to be interpreted in good faith, and an interpretation in good faith required that Australia should not be permitted to assert that an East Timorese person is a Portuguese national: that conclusion should be reached because Australia not only has recognised Indonesian sovereignty *de jure* over East Timor but also has argued before the International Court of Justice (*Case concerning East Timor* (Portugal v Australia) ICJ Rep (1995) 90) that Portugal lacks standing to assert or protect, internationally, the interests of the people of East Timor.

It is convenient to deal with Mr Dubler's submissions in the context of Ms Ronalds' second proposition. We shall consider Ms Ronald's three propositions in turn.

Mr H Burmester, who appeared with Mr G A Mowbray for the Minister, developed arguments supporting the reasoning and conclusions of the Tribunal.

Portuguese nationality law

Portuguese law was a question of fact for the Tribunal. The Tribunal had obtained an opinion dated 31 August 1994 from Dr Rui Manuel Moura Ramos, a Professor in the

Faculty of Law at the University of Coimbra and at the Catholic University of Portugal. It also had before it answers given by Dr Ramos to further questions which had been put to him, for the purpose of clarifying his advice in certain respects, and departmental cables reporting answers given by Portuguese officials to questions put to them, particularly as to the commencement dates, and the scope of application, of certain of the laws referred to by Dr Ramos.

In brief, the opinion expressed by Dr Ramos was that persons born in East Timor in 1973 were from birth, with certain immaterial exceptions, Portuguese nationals: that resulted from Law No. 2098 of 29 July 1959.

Again in reliance on the opinion of Dr Ramos and on the departmental cables, the Tribunal rejected the suggestion (made in an advice given in May 1993 by Professor Hilary Charlesworth of the University of Adelaide, relied on by Mr Jong) that Portuguese law gave Mr Jong at his birth not actual nationality but only an inchoate right to acquire nationality, should he apply for it. As for the possibility that Mr Jong, though he had acquired Portuguese nationality at birth, had later (under Portuguese law) lost it by reason of later events, the Tribunal, again relying on Dr Ramos' opinion, held that this was not so. In particular,

Portuguese law having no principle against dual nationality, Mr Jong's acquisition of Indonesian nationality - assuming the acquisition to be recognised by Portuguese law - would not deprive him of his Portuguese nationality, nor was there evidence of a renunciation by Mr Jong of his Portuguese nationality in a form which - assuming again the recognition by Portuguese law of his Indonesian nationality - would be effective.

The material before the Tribunal amply justified its acceptance of Dr Ramos as an expert on Portuguese nationality law. The contrary was not suggested. No other expert evidence on Portuguese law was before the Tribunal and Professor Charlesworth disclaimed, for herself, any expertise in Portuguese law. There was a suggestion that there were ambiguities in Dr Ramos' opinion and the departmental cables. The Tribunal held, however, that there was no relevant ambiguity for reasons which seem unassailable to us. Accordingly, the conclusion of the Tribunal that, under Portuguese law, Mr Jong acquired at birth, and retains, Portuguese nationality has not been shown to have involved any error of law.

Before leaving this aspect of the matter it is convenient to refer to one of the errors of law alleged in the application. Ground (iii) is as follows:

> *The decision involved an error of law in that the onus of proof of proving the existence of an alternate nationality lies on the first respondent as the party asserting that the applicant is a Portuguese national as well as an Indonesian national and the first respondent failed to discharge this onus of proof.*

The particulars given are the acceptance of Dr Ramos as an expert on the recommendation of the head of another Portuguese law school, an alleged lack of

unambiguous evidence as to the status and date of operation of certain Portuguese laws and a lack of evidence submitted by the Minister as to Mr Jong's acquisition or retention of Portuguese nationality.

The first of those particulars in our view lacks substance. There is no reason why the Tribunal should not rely on the view expressed by the head of a Portuguese university law school as to the identity of an appropriate expert, at another Portuguese university law school, on Portuguese nationality law. As we have said, the allegation of ambiguity in our view also lacks substance. As for the other matters, certainly the inquiries of Dr Ramos were initiated by the Tribunal, not the Minister; but it was clearly open to the Tribunal to make those enquiries. Having itself sought and obtained expert evidence, the Tribunal was not precluded from relying on it simply by reason of the fact (if it were the fact) that the Minister had submitted no evidence on the same subject. In any case, probably it is generally inappropriate to speak of an onus of proof in hearings by the Tribunal (Nagalingam v Minister for Immigration (1992) 38 FCR 191 at 200); and, not being a party to the Tribunal proceedings, the Minister cannot in any event be said to bear an onus of proof.

It was, in our view, clearly open to the Tribunal to be satisfied that Mr Jong, as a matter of Portuguese law, acquired and retained Portuguese nationality; and, in so satisfying itself, it made no error of law.

International recognition of Portuguese nationality

(i) Acquisition of Portuguese nationality

The issue may be stated in the form of a question: granted that by the law of Portugal Mr Jong is a Portuguese national, is he also to be regarded as a national of Portugal for the purposes of the definition of "refugee" in Article 1 of the Refugees Convention? Thus stated, the question, for the reasons we have given, is one of construction in accordance with the rules of interpretation recognised by international law: Minister for Foreign Affairs and Trade v Magno (1992) 112 ALR 529 at 535, 536 per Gummow J. As Gummow J pointed out, the customary rules of interpretation have been codified by the Vienna Convention. That Convention provides, in Article 31:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

Emphasis was placed on two elements of that provision in the course of argument. One was the requirement that a treaty be interpreted "in good faith", a phrase which received attention in argument and to which we shall return. The other was the requirement that a treaty be interpreted "in the light of its object and purpose". We have already referred to the consideration by the High Court in Applicant A of the way in which, in the construction of the Refugees Convention, elements such as these are to be taken into account.

The Hague Convention is also important. The first three articles provide:

Article 1

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2

Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Article 3

Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

Article 5 should also be mentioned: it gives effect to one of the stated objects of the Hague Convention, that it is desirable that each person should have one nationality only. It provides that within a third State a person having more than one nationality is to be treated as having only one; and, without prejudice, among other things, to any conventions in force, the third State is to recognise exclusively the nationality of the country where the person is habitually and principally resident or with which he appears to be in fact most closely connected. Clearly, however, Article 5 can have no direct bearing on the construction of the word "refugee" in Article 1 of the Refugees Convention: that definition explicitly contemplates that third States, in ascertaining whether they have obligations to a person under the Refugees Convention, will take account of dual (or multiple) nationalities.

Having regard to the purpose or object of the Refugees Convention, it is not surprising that this should be so. States have no general obligation to admit foreigners or offer them protection (see, e.g. Oppenheim's International Law 9th ed 1992 (Sir Robert Jennings and Sir Arthur Watts) (Oppenheim) at 857, 858). The Refugees Convention provides an exception to that general rule; but it is an exception which provides for "international protection" only where "national protection" is not available: Handbook on Procedures and Criteria for Determining Refugee Status (Office of the United Nations High Commission for Refugees) Geneva, 1992 (UNHCR Handbook), para 106; James C Hathaway, The Law of Refugee Status 1991 (Hathaway), at 57. That aspect of the object or purpose of the Refugees Convention is of some importance in relation to certain of the arguments put to us as to whether an Australian court or tribunal should "recognise" the Portuguese nationality which Mr Jong has under Portuguese law.

We were referred to some well known decisions in which the courts of this and other countries have considered, for various purposes of domestic law, whether the act of another state in conferring or removing its nationality should be recognised or treated as effective: Sykes v Cleary (1992) 176 CLR 77; Oppenheimer v Cattermole [1976] AC 249; United States Ex Rel Schwarzkopf v Uhl (1943) 137 F 2d 898; but, except to the extent that those cases emphasise the prime importance, for any such inquiry, of the law of the state whose nationality is in question, none seems to us to offer any particular guidance as to the questions which we have to decide. Particularly, we do not think anything in this case turns upon an exception to the primacy of national law identified by Lord Cross of Chelsea (Oppenheimer at 277) and approved by Brennan J in Sykes at 112:

> *If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connexion or only a very slender connexion with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognise.*

We were referred also to the well known passage in the majority opinion of the International Court of Justice in the Nottebohm case ICJ Rep (1955) 4 at 23:

> *According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.*

We do not think that the principle thus laid down is of assistance in resolving the issues in this case. As the context of the observations makes clear, they were made having regard particularly to Article 5 of the Hague Convention, to which we have referred; but, as we have explained, that Article is of no relevance in the present context. Secondly, the case had to do with the naturalisation by Liechtenstein of a person who had no connection with that State by reason of birth, residence or any other form of significant attachment.

Here, by contrast, nationality was conferred by Portugal on Mr Jong by reason of his birth within a territory which was, at that time, Portuguese. There can be no question as

to the acceptance of *jus soli* as a basis for the conferral of nationality: Ian Brownlie, Principles of Public International Law 4th Ed (Brownlie) at 387 ff; Oppenheim at 870 ff. It is common ground that East Timor, at the time of Mr Jong's birth, was a Portuguese colony and there can be no doubt as to Portugal's authority, as a matter of international law, to confer its nationality on persons born there: see Oppenheim at 275, 276; P Weis, Nationality and Statelessness in International Law 1979 (Weis) at 153. The conclusion must be that the Tribunal made no error of law in concluding that the conferral on Mr Jong of Portuguese nationality should be recognised for the purpose of applying the Refugees Convention. We deal later in these reasons with the further question, whether the nationality should be regarded as "effective".

(ii) Retention of nationality

The next question is whether the Tribunal made an error of law in concluding that nothing which had happened in or since 1975 should be treated as depriving Mr Jong, for the purposes of the Refugees Convention, of his Portuguese nationality. The principal events concerned are the 1975 declaration of independence by Fretilin, the Portuguese withdrawal from East Timor, its incorporation as a province of Indonesia, Australia's recognition of Indonesian sovereignty, *de jure*, over East Timor and the grant by Indonesia to Mr Jong of Indonesian nationality.

It is clear enough that the mere discontinuance of a close or real connection between Mr Jong and Portugal would not have deprived him of his Portuguese nationality: Sykes v Cleary, supra. Nor, in our view, did the subsequent events, culminating in Indonesia's incorporation of East Timor into its own territory, have that effect. Certainly statements may be found in writings on the subject of nationality to the effect that "the

population follows the change of sovereignty in matters of nationality" (Brownlie, p 661). The examples given, however, seem typically to be either cases illustrating a practice of successor states of granting their citizenship to the residents of acquired territories (Brownlie, pp 662, 663; as to former colonies, Weis p 153 ff) or cases where a treaty has been concluded between the predecessor and successor states: e.g. two cases to which we were referred, Doe d Thomas v Acklam (1824) 2 B&C 779, R v Ramage (1902) 23 Natal Law Reports (NS) 45. We were not referred to any established practice or convention by which, in the absence of a treaty, predecessor states cease to regard inhabitants of territory lost as their nationals or (which is perhaps the same thing) any established principle of international law requiring that predecessor states do so. This is particularly so in a case such as the present, where Portugal does not recognise Indonesia's sovereignty over East Timor and regards itself as the "administering Power" (see Portugal v Australia). The conclusion stated in Weis at 148 is, we think, clearly correct:

> *Where ... the predecessor State does not recognise the transfer because it was inconsistent with international law no ... duty to withdraw its nationality exists.*

So, also, is the more general statement in Weis at 126 (though it is made in the context of possible restrictions on a state's ability to take away its nationality, rather than the context of possible rules requiring it in certain circumstances to do so):

> *To sum up: the right of a State to make rules governing the loss of its nationality is, in principle - with the possible exception of the prohibition of clearly discriminatory deprivation - not restricted by international law, unless a State has by treaty undertaken specific obligations imposing such restrictions.*

Mr Dubler, as *amicus curiae*, argued that a colony or former colony should be regarded for the present purposes as analogous to a mandated or trust territory under Chapter 12 of the Charter of the United Nations whose inhabitants "cannot be nationals of the administering power" (Brownlie, p 395). The difficulty with the analogy is, of course, that the specific regime established for mandated and trust territories is a regime which is quite different from colonisation. Cases such as those to which we were referred (Doe d Thomas v Acklam, supra and R v Ramage, supra) proceed on the footing that the inhabitants of a colony have the nationality of the colonising power; and the correctness of the assumption, as a matter of international law, is assumed in, and appears to be borne out by, the discussion of decolonisation in Weis at 153 ff: see also the discussion, in a somewhat different context, in Brownlie at 662 ff. The analogy sought to be drawn is, in our view, unsound. Nor, we think, does it help to refer to Chapter 11 of the Charter and to the right of the people of East Timor, recognised by both Portugal and Australia, of self determination. We were referred to no treaty or practice which requires a former colonial power to withdraw its nationality, already conferred on inhabitants of its former colony, in circumstances where a right of self determination has not yet been exercised. In principle, it is difficult to see why such a former colonial power should in those circumstances be required to do so.

Effect of Indonesian nationality and Australian recognition

There remain two arguments to be considered. One is that, having acquired Indonesian nationality, Mr Jong should no longer be held to be a Portuguese national because the law of Indonesia would deprive him of Indonesian nationality if he were to apply for or obtain indicia, such as a passport, of nationality of another country. We think it is not unfair to say that that argument was based principally upon hardship to Mr Jong who (assuming the statement about Indonesian law to be correct) would, if he accepted Portugal's protection, deprive himself of Indonesian nationality and thus, possibly, of his right to return to his homeland. Clearly enough, however, there is no principle requiring Portugal to withdraw its nationality, or requiring that that nationality not be recognised, simply on the basis of Indonesian law being as it was said to be.

Both Ms Ronalds for Mr Jong and Mr Dubler as *amicus curiae* argued that Australia, having recognised Indonesian sovereignty over East Timor, could not in good faith recognise that inhabitants of East Timor are Portuguese nationals. It was put that Australia, having based its opposition to Portugal's proceedings in the International Court of Justice in the East Timor case on the proposition that Portugal had no authority to represent the inhabitants of East Timor, could not consistently recognise that East Timorese were Portuguese nationals. Assuming, however, (and without deciding) that such an inconsistency would be sufficient to require an Australian court to refuse recognition of Mr Jong's Portuguese nationality for the purposes of the Refugees Convention, in our view there is no inconsistency. It is not suggested, after all, that all the inhabitants of East Timor, whether born before or after 1975, are Portuguese

nationals; all that is suggested is that a particular East Timorese person, born at a time when East Timor was a Portuguese colony, acquired Portuguese nationality at birth and has not, as a result of any event which has occurred since, been deprived of it. That limited proposition is not inconsistent with the position, taken by Australia, that Portugal has no general authority internationally to represent, or to protect the interests of, the East Timorese people.

One final comment may be made. The material before the Tribunal indicates that to require Mr Jong to avail himself of Portuguese protection - assuming it to be available, a question yet to be discussed - might impose on him considerable hardship. Although the material indicates that there is an East Timorese community in Portugal, there is no suggestion that Mr Jong has any personal or family connections there. On the other hand, it is evident from the material that Mr Jong has substantial family connections with Australia and he has, of course, now lived here for several years. It must be said, however, that this does not assist his application for recognition as a refugee. For that purpose his connections here must be treated as irrelevant. What he seeks is international protection; and that is not to be given, under the Refugees Convention, where national protection is available.

In the result, on this aspect of the case also the Tribunal's decision is not vitiated by any error of law.

"Effectiveness" of Portuguese nationality

Counsel for the applicant argued that the Tribunal had failed to draw a distinction between formal nationality and nationality which, for the purposes of the Refugees

Convention, is effective and that in doing so the Tribunal had erred in law, with the consequence that its approach to this aspect of the matter was erroneous in a fundamental way.

The commentary in the UNHCR Handbook supports the distinction contended for by the applicant. Paragraph 107 says:

> *In examining the case of an applicant with dual or multiple nationality, it is necessary, however, to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals. In such circumstances, the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal.*

The passage we have just quoted reveals a clear view that the inquiry does not necessarily end, in the case of a person with dual nationality, once it is concluded that the person has a second nationality and has no fear of persecution for a convention reason in the country of the second nationality. In such a case there remains the question whether the nationality is "effective", which in turn may lead to an inquiry as to the "availability" of protection.

Professor Hathaway supports this view. In his discussion of the situation of persons with dual or multiple nationality, having pointed out that it is "an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection", Professor Hathaway says: (Hathaway at 59).

> *The major caveat to the principle of deferring to protection by a state of citizenship is the need to ensure effective, rather than merely formal, nationality. It is not enough for example, that the claimant carries a second passport from a non-persecutory state if that state is not in fact willing to afford protection against return to the country of persecution. While it is appropriate to presume a willingness on the part of a country of nationality to protect in the absence of evidence to the contrary, facts that call into question the existence of basic protection against return must be carefully assessed.* [Emphasis in original text]

In observing that dual nationality is not to be equated with the right to claim a second nationality, Professor Hathaway (at 59) emphasises the importance of an inquiry into effective nationality:

> *The dilemma here is a logical extension of concern to ensure effective nationality before assessing the adequacy of a refugee claim: only the degree of risk in those states that are known to be obliged to allow the re-entry of the claimant is relevant, as it is to one of those states that the putative refugee would in most cases be sent back if not admitted to the country of refuge.* [The second emphasis is ours]

We should note too that counsel for the respondent accepted that Article 1A(2) refers to persons who are "able to avail themselves of protection from a country of nationality".

What is involved here is the proper construction of Article 1A(2) of the Refugees Convention. To interpret "nationality" for the purposes of Article 1A(2) as something of a "merely formal" character (to use the language of Professor Hathaway), instead of something effective from the viewpoint of a putative refugee, would be liable to frustrate rather than advance the humanitarian objects of the Refugees Convention. Nor would such a construction advance, in any practical way, another object of the Refugees Convention, namely the precedence of national protection over international protection. That precedence has no obvious relevance where national protection is not effective; as the UNHCR Handbook puts it (paragraph 107), in circumstances where a second nationality may be deemed to be ineffective because it does not entail the protection normally granted to nationals, "the possession of the second nationality would be not inconsistent with refugee status".

Given the objects of the Convention, it can hardly have been intended that a person who seeks international protection to which, but for a second nationality he or she would clearly be entitled, would, as a consequence of a formal but relevantly ineffective nationality, be denied international protection and, not being a "refugee", could be sent back to the country in which he or she feared, and had a real chance of, being persecuted.

In these circumstances, to construe "nationality" where it first appears in the second paragraph of Article 1A(2) of the Refugees Convention as referring to nationality that is effective as a source of protection and which is not merely formal is, in our view, to

interpret Article 1A(2) in the manner required by the Vienna Convention as explained in the High Court in Applicant A, that is to say, in accordance with the ordinary meaning of the text but considering also the context and the object and purpose of the Refugees Convention.

Effective nationality for this purpose is of course something that must be assessed in the light of all the circumstances of a particular case. The inquiry will thus extend to a range of practical questions, parallel to those posed by the expression "unable" in the first paragraph of Article 1A(2).

It follows from the construction we consider to be correct that findings that a person has dual nationalities but lacks a well-founded fear of persecution in one of the countries of nationality will not necessarily preclude a finding that the person is a refugee.

Although it would make no difference to the result in the present application for judicial review, it may be that the same conclusion can be reached by a somewhat different route. It may be expressed, by reference to the circumstances of Mr Jong, as follows. Mr Jong left the place where he had lived all his life; the place he left was one of his countries of nationality. He left it, let us assume, owing to a well-founded fear of persecution. His other country of nationality is on the other side of the world. He did not go there, though he has no fear of persecution there, but travelled instead to a neighbouring country, Australia. Let it be assumed (but of course it is not for this Court to find) that, desiring to seek protection, he could as a practical matter seek it only in Australia, even

had he wished to seek it in Portugal. Thus, as a matter of fact, he is outside each of his two countries of nationality. The reason why he is outside each of the countries of his nationality (rather than where he would otherwise be, in that one of them in which he had previously lived) is (on the assumptions made) that he had, and has, a well-founded fear of persecution. That, by itself, would not make Mr Jong a refugee: it would still be necessary to consider whether he was able to avail himself of the protection of the country of his second nationality (Portugal). That consideration would involve the willingness and ability of Portugal to offer protection (issues of a kind which arise when considering effectiveness, if the other approach is taken). If Portugal could not or would not offer protection, the concluding words of the second paragraph of the definition of "refugee" could hardly be applied against Mr Jong.

It is true that the alternative approach just outlined is contrary to an observation of La Forest J in Canada (Attorney General) v Ward (1993) 103 DLR 4th 1 at 42, that an applicant for recognition as a refugee bears a burden which "includes a showing of well-founded fear of persecution in all countries of which the claimant is a national". But, as his Lordship's judgment proceeds to recognise, there is an exception, at least in the case where the second country of nationality does not offer protection to the applicant. Once that is recognised, it seems to us, with respect, that there may be a degree of artificiality in approaching the matter on a basis which requires first a consideration of whether effective protection is offered and, only if that test is passed, a separate consideration of whether the applicant can avail himself of that protection.

However that may be, the Tribunal in our view fell into error because it proceeded on the basis that once Portuguese nationality was established Mr Jong was not a refugee unless it could be shown (as it could not) that he had a well-founded fear of persecution in Portugal. The Tribunal did have before it a good deal of material relevant to the question of the effectiveness of Portuguese protection. That material included evidence about the steps which Mr Jong would need to take in order to satisfy the Portuguese authorities as to his Portuguese nationality so as to obtain first a certificate of identity and, subsequently, a passport; whether it was possible for him to take any of those steps in Australia; and whether he would be allowed to enter Portugal voluntarily or, alternatively, if he were deported. Mr Burmester suggested that the Tribunal's discussion of those matters indicated that it had considered the issue of "effective" nationality in the sense of the availability, as a matter of fact, of Portuguese protection and Mr Jong's ability, as a matter of fact, to obtain the benefit of it. In our view, however, the reasons of the Tribunal indicate clearly that it used the material, relevant to the availability of protection, only for the purpose of determining whether Mr Jong had acquired, and had retained, Portuguese nationality. The error which, in our opinion, the Tribunal made was that it failed to recognise the necessity, in applying the definition of "refugee" in circumstances of dual nationality, of considering the "effectiveness" of his Portuguese nationality as a distinct issue. That is an error of law because it proceeds from an erroneous construction of Article 1A(2) of the Refugees Convention.

Whether Portugal offers Mr Jong effective protection and whether he can avail himself of Portuguese protection are questions of fact and, therefore, questions for the Tribunal and not for the Court. As in the case of any applicant for a protection visa, they are to

be answered having regard to the particular circumstances relating to Mr Jong at the time when the decision is to be made. Relevant matters include whether Portugal is able to offer him in Australia effective protection or the means of obtaining effective protection or whether, on the other hand, if effective protection is available it can be obtained only in Portugal; and, if the latter, whether, as a matter of fact, Mr Jong is reasonably able to travel to Portugal to obtain protection there and whether, if he were to travel there, he would be admitted; and whether, having been admitted he would satisfy the Portuguese authorities that he is indeed a Portuguese national entitled to Portuguese protection. Of particular relevance would be the practical operation, in Mr Jong's case, of Portuguese law and administrative procedures in circumstances in which a person whose Portuguese nationality is said to derive from birth in a former colony travels voluntarily to Portugal or, to take a different case, is sent there unwillingly. One of the ironies of the case is that an Australian tribunal has had to consider the question of Mr Jong's Portuguese nationality, and this Court has now had to do so, in circumstances where the Portuguese authorities have not done so and have indeed, on the evidence before the Tribunal, expressed a reluctance to do so in Australia.

We should add that the material before the Tribunal in this case indicates, in our view, that Mr Jong's circumstances are not appropriately dealt with by applying a presumption of national protection (cf Ward at 44).

Grounds of application

We shall set out the grounds, in order, with our comments on them. It is unnecessary to set out in full the particulars of each ground given in the application. The "second

respondent" referred to in the grounds is the member who constituted the Tribunal; but in fact neither he nor it is a party to these review proceedings: Migration Act s 480.

> *(i) The decision involved an error of law in that the second respondent construed the relevant provisions in Article 1A(2) of the Refugees Convention (as defined in section 4 of the Migration Act 1958) as requiring consideration of the existence or otherwise of Portuguese citizenship for the applicant when Portugal abandoned sovereignty over East Timor in 1975.*

The Tribunal did not, in this respect, construe the Refugees Convention erroneously. The question was whether or not Mr Jong had more than one nationality. For the reasons we have given, the Tribunal made no error of law in concluding that he had Portuguese, as well as Indonesian, nationality.

> *(ii) The decision involved an error of law in that the second respondent failed to find that Australia has recognised Indonesian sovereignty de jure over East Timor.*

That Australia has in fact done so was not in controversy between the parties. It is quite true that the Tribunal took the view that in the absence of an executive certificate it should not "examine the evidence of the Executive's attitude to sovereignty over East Timor". However that may be, nothing follows from it because the Tribunal proceeded to consider the result which would follow if it were to take account of Australian *de jure*

recognition of Indonesian sovereignty. In dealing with the matter on that basis, the Tribunal, as we have explained, made no error.

> *(iii) The decision involved an error of law in that the onus of proof of proving the existence of an alternate nationality lies in the first respondent as the party asserting that the applicant is a Portuguese national as well as an Indonesian national and the first respondent failed to discharge the onus of proof.*

We have already given our reasons for rejecting this ground.

> *(iv) The decision involved an error of law in that the second respondent found that the applicant retains the Portuguese nationality which he acquired by his birth in East Timor in 1973.*

We have already given reasons for our conclusion that the Tribunal made no error in this respect.

> *(v) The decision involved an error of law in that the second respondent held that an individual in a ceded or conquered territory retains the nationality of the predecessor State until provision is made in the domestic law of that State for the termination of that nationality.*

It is not clear that this ground correctly summarises what the Tribunal held. Again, we have already discussed this question and concluded that the Tribunal was not in error in this respect.

(vi) The decision involved an error of law in that the second respondent held that recognition of Indonesian sovereignty over East Timor and the concomitant loss of Portuguese sovereignty did not prevent the continuing recognition by an Australian court of the Portuguese nationality of a person whose only connection with that country is his birth within the Territory at a time when it was under Portuguese administration.

We have dealt with this matter also; the Tribunal's decision in this respect did not involve an error of law.

(vii) The decision involved an error of law in that the second respondent found that the applicant is not a refugee because he is not a person who is outside his country of origin - Portugal - owing to a well-founded fear of persecution for a Refugees Convention reason and is unable, or owing to such fear, is unwilling to avail himself of the protection of Portugal.

This ground is, perhaps, rather curiously stated, particularly in relation to its use of the phrase "country of origin" as opposed to "country of nationality". If it were expressed to refer to the "country of nationality" then the ground might raise the error of law which, we have held, the Tribunal made. For reasons which will appear when we deal with ground (viii), however, this is a question which need not be pursued further.

(viii) The decision involved an error of law in that the second respondent found that the applicant did not satisfy the criterion for the grant of a protection visa in that he is not a person to whom Australia has protection obligations under the Refugees Convention.

This ground is so widely stated that literally, at least if one disregards the particulars, it might be said that the error which we have found the Tribunal to have made falls within it. In any event, the issue about "effectiveness" was fully argued and no point was taken about the scope of the application for judicial review.

Conclusion

For these reasons we would order that:

(i) The decision of the Refugee Review Tribunal be set aside.

(ii) The matter be remitted to the Refugee Review Tribunal for further consideration in accordance with law.

(iii) The respondent pay the applicant's costs.

An order was sought that the member who constituted the Tribunal when it made the decision under review not constitute it in any further hearing or consideration of the matter. A question of reasonable apprehension of bias was raised during the course of the Tribunal's hearing and dealt with - in our view adequately - by the Tribunal in its reasons. There was no argument in support of the order sought, and in the circumstances we do not think it should be made. No doubt the matter will be allocated in accordance with the Tribunal's ordinary procedures. No other ancillary relief is now sought or required.